No. 87-1112

FILED
JUN 10 1988
CLERK

In The
Supreme Court of the United States
October Term, 1987

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, ANDREW STEIN, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, FERNANDO FERRER, CLARE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

Appellants,

-and-

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Appellant,

-against-

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Appellees.

FRANK V. PONTERIO,

Intervenor-Appellant,

v.

BEVERLY MORRIS, JOY CLARKE HOLMES, and JOANNE OPLUSTIL,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF APPELLANT FRANK V. PONTERIO

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QUESTION PRESENTED FOR REVIEW

Whether the combination of at-large and local members of the Board of Estimate in the context of the voting procedures of the Board, creates a system of representation that satisfies constitutional standards for instruments of local government.

THE PARTIES TO THE PROCEEDINGS BELOW

The following parties and *amici curiae* participated in the proceedings before the Court of Appeals:

(i) *Plaintiffs-Appellees:* Beverly Morris, Joy Clarke Holmes, Joanne Oplustil

(ii) *Defendants-Appellants:* THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, ANDREW STEIN, individually and as City Council President, HARRISON J. GOLDIN, individually and as comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, FERNANDO FERRER, CLARE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

(iii) *Intervenor-Defendant-Appellants:* Frank V. Ponterio; Robert A. Straniere, individually and as a member of the New York State Assembly

(iv) *Amici Curiae:* John J. Marchi, John F. Banzhaf III, Staten Island League for Better Government, Citizens Union of the City of New York, Peter F. Vallone and other members of the New York City Council

The Municipal defendants and intervenor Strainere have joined in a separate, companion appeal to this Court.

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Banzhaf, "Multimember Electoral Districts—Do They Violate the "One Man, One Vote" Principle," 75 Yale LJ. 1309 16

R. Dixon, "Democratic Representation—Reapportionment in Law and Politics," Oxford University Press (1968) 8,9

Groffman and Scarrow, "The Riddle of Apportionment: Equality of What?", National Civic Review, 242 (1981) 8

Groffman and Scarrow, "Weighted Voting in New York," iv Legis L.Q. 287 (May 1981) 12

Krislov, "The Power Index, Reapportionment and the Principle of One Man, One Vote," 1965 M.U.L.L. 37 16

G. Sartori, "Democratic Theory," Wayne University Press (1962) 14

Shapeley and Shubik, "A Method for Evaluating the Distribution of Power in a Committee System," 48 Am. Pol. Sci. Rev. 787 16

L. Tribe, "American Constitutional Law," Second edition, Mineola, N.Y. The Foundation Press (1988) 9

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BRIEF OF APPELLANT FRANK V. PONTERIO

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, dated October 8, 1987, is reported at 831 F.2d 384 (A5)[1].

The decisions of the United States District Court for the Eastern District of New York, dated August 21, 1984 and November 16, 1986, are reported at 592 F.Supp. 1462 and 647 F. Supp. 1463 (A55, A119).

-- The trial court's rulings came upon remand from the Court of Appeals for the Second Circuit, which, in a deci-

1. Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix submitted with the Jurisdictional Statement. Numbers in parentheses preceded by the letters "JA" refer to pages in the Joint Appendix.

sion dated May 16, 1983, held that the New York City Board of Estimate is subject to the one-person, one-vote principle. This decision, which reversed the initial judgment entered by the trial court, is reported at 707 F.2d 686 (A186).

The first decision of the United States District Court for the Eastern District of New York is reported at 551 F. Supp. 652 (A208).

JURISDICTION

Alleging that the composition and voting structure of the New York City Board of Estimate, as set forth in sections 61 and 62 of the New York City Charter, violates the equal protection clause of the United States Constitution, plaintiffs-appellees Morris, *et al.* sought declaratory and injunctive relief pursuant to 28 U.S.C. Sections 2201 and 2202. Appellees predicated jurisdiction in the trial court upon 28 U.S.C. Sections 1331 and 1343.

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 8, 1987 affirming the trial court's grant of plaintiffs' motion for summary judgment.

A Notice of Appeal to this Court on behalf of Intervenor-Defendant-Appellant Frank V. Ponterio was timely served and filed in the Court of Appeals for the Second Circuit on December 16, 1987. The municipal appellants and Intervenor-Defendant-Appellant Robert A. Straniere served and filed notices of appeal on October 15, 1987 and November 6, 1987 respectively.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1254(2) in that the Court of Appeals

held a state statute to violate the United States Constitution.

CONSTITUTIONAL PROVISION AND STATE STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New York City Charter:

Section 61: *Membership.* The mayor, the comptroller, the president of the Council, and the presidents of the boroughs shall constitute the board of estimate.

Section 62: *Voting in the board.*

a. As members of the board of estimate, the mayor, the comptroller and the president of the council shall each be entitled to cast two votes, and the president of each borough shall be entitled to cast one vote.

b. Except as otherwise provided in this charter or by law, the board shall act by resolution adopted by a majority of the whole number of votes authorized to be cast by all the members of the board.

c. No resolution or amendment of any resolution shall be passed at the same meeting of the board at which it is originally presented unless by a three-fourths vote or shall be finally passed except at a meeting open to the public. Prior to a final vote by the board on any resolution or amendment of any resolution members of the general public shall be afforded the opportunity to be heard on such resolution or amendment.

d. A quorum of the board shall consist of a sufficient number of members thereof to cast six votes, including at least two of the members authorized to cast two votes each.

STATEMENT OF THE CASE

Appellees (plaintiffs below), residents of the Borough of Brooklyn within the City of New York, commenced this action in December 1981 seeking declaratory and injunctive relief to remedy their alleged underrepresentation on the Board of Estimate. The Board of Estimate is a municipal body composed of 8 *ex officio* members: the Mayor, Comptroller, City Council President (each of whom has 2 votes on the Board), and the Presidents of 5 boroughs of the City (each of whom has 1 vote on the Board). Plaintiffs complain that equal votes for all Borough Presidents, notwithstanding unequal borough populations, results in a constitutionally unacceptable malapportionment of the Board.

Appellant Ponterio, a resident of Staten Island, intervened as a defendant in March 1982.[2]

Appellees moved for summary judgment in April 1982, and appellants cross moved. On December 1, 1982, the trial court granted appellants' motion dismissing the complaint on the ground that, as a matter of law, the Board is not subject to the one person, one vote doctrine. On May 16, 1983, the Court of Appeals for the Second Circuit reversed and remanded the case for a hearing on whether the Board, as constituted, offends the equal protection clause.

Upon remand, the trial Court bifurcated the case; first to decide upon an appropriate methodology for quantifying malapportionment and the resultant deviation, and second to rule on whether legitimate state interests justified such deviation. Appellant Ponterio submitted proposed analysis methodologies showing malapportionment to be within acceptable bounds and moved to deem methodology issues resolved. Appellees moved for summary judgment on the basis of an alleged deviation of 132.9% obtained by excluding the at-large members from the analysis and computing deviations of actual borough populations from an "ideal" borough population (i.e., one-fifth of the City population). The trial Court issued a

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2. On January 1, 1987 Ponterio took office as a Judge of the Civil Court of the City of New York. Because he believed his continued appearance *pro se* might conflict with the Canons of Judicial Ethics, Ponterio appeared on the second appeal to the Court of Appeals by his daughter, Barbara Ponterio, then a third-year law student, with the Court's permission. Later a New York State Advisory Committee on Judicial Ethics rendered advisory opinions holding that it would be a violation of the Canons of Judicial Ethics for Ponterio to appear *pro se* on this appeal to the Supreme Court but that he could appear by an attorney. Philip G. Minardo, Esq., president of the Richmond County Bar Association, volunteered to represent Ponterio on this appeal.

Memorandum and Order adopting Appellees' methodology and deviation percentage.

Subsequently, the parties and *amici* submitted memoranda of law and affidavits on the justification issue. Appellees re-raised the methodology issue by admitting that a different method, district voting power, is a constitutionally acceptable means for apportioning and analyzing the Board, and presenting a proposed Board reapportionment following (albeit incorrectly) voting power principles. Appellant Ponterio responded with several voting-power analyses showing the Board to be apportioned within constitutional bounds and challenging Appellees' computations as erroneous. Several rounds of argument and counter-argument by appellant Ponterio and Appellees ensued. No other parties participated in these exchanges.

On November 19, 1986, the district court ruled that defendants had failed to justify the adjudged deviation of 132.9%, while acknowledging the legitimacy of historic, geographic and functional reasons advanced in support of the Board's composition and voting system. The court noted the existence of alternative plans with smaller deviations from strict voter equality that would substantially further those state interests. The court did not address the voting power arguments raised by intervenor Ponterio during the justification phase even though those arguments were submitted with the Court's approval.

On October 8, 1987 the Second Circuit affirmed. The Court of Appeals (per Oakes, J.) held that "in calculating voter equality for equal protection purposes the City-wide members should be, if not ignored, not considered in the appropriate analysis" (A33). In a separate concurrence, Judge Newman, while joining the majority, opined that in

some circumstances the equal protection clause might permit local governments to combine "dominant" at-large members with single-member districts of different populations (A51-53).

Ponterio and the City defendants filed separate appeals while defendant Straniere joined in the City defendants' appeal. This Court noted probable jurisdiction on April 4, 1988 and the two appeals were consolidated.

SUMMARY OF ARGUMENT

The Courts below have decided that the people of the City of New York cannot have the form of local government they want because those Courts are unable to analyze an 8-member Board of Estimate except by pretending that it is two boards, one with 5 members and another with 3. This case demonstrates, as no other, the fragility, ambiguity, and inconsistency of the one person, one vote doctrine as it has evolved from the 1964 reapportionment decisions of this Court. Appellant Ponterio asks this Court to finc that innovative forms of local government can survive judicial scrutiny only if it is recognized that fair representation, not an undefinable citizen vote value, is the fundamental requirement of the Fourteenth Amendment.

The Board of Estimate is unlike any other body of local government, just as the City of New York is unlike any other municipality. The Board is specially tailored to the City's needs. It provides fair representation to each constituent borough while assuring majority control. Its constitutionality has been demonstrated by Appellant Ponterio using a district (borough) voting power analysis. The same analysis method has been used extensively in New York State to apportion county boards of supervisors

which, like the Board of Estimate and unlike legislatures, function only by voting.

The Court below elected to analyze a board that does not exist, i.e., a 5-member board of borough presidents, because the arithmetic was simpler. To implement this Procrustean approach, the Court hypothosized facts about the representational attitudes of citizens and Board members that contradict facts presented by the mayor and the Staten Island borough president. Since it was a motion for summary judgment that was before the Court, the decision below should be reversed on procedural, if not substantive, grounds.

ARGUMENT

A quarter century after state legislative districting was brought within the ambit of the Fourteenth Amendment, the one person, one vote doctrine remains an enigma. Grofman and Scrarrow, "The Riddle of Apportionment: Equality of What?", National Civic Review, 242 (1981). In the seminal state apportionment case, *Reynolds v. Sims,* 377 U.S.533, the Court in a sort of judicial putting of the cart before the horse focused on a particular implementation of the doctrine, viz., equal population districting, rather than on a definition of its fundamental basis. Moreover, no unambiguous basis can be inferred since the equal-population-district implementation nominally satisfies several rational bases. *Reynolds* and its five companions decided the same day were severely criticized. "Perhaps the most striking aspect of the "big six" reapportionment cases is their superficial, politically aseptic quality". R. Dixon, "Democratic Representation-Reapportionment in Law and Politics", p. 199, Oxford University Press, 1968 (hereinafter "Dixon"). Chief Justice Warren, apparently in an attempt to paint the doctrine as more than a pragmatic arithmetic dogma, explain-

ed that "fair and effective representation for all citizens is concededly the basic aim of legislative apportionment", *Reynolds,* 377 U.S. at 565-66.

This mixing of input and output, of basis and implementation, also came under criticism by legal scholars.

> A further key element of the majority's constitutional theory was the equating of *districting* based on "equal numbers of people" with an *operating result* of "equal representation." It was assumed unquestioningly that "equal representation" magically arises from creating districts of equal population. The term *"equal population districts"* denotes a verifiable objective concept. But *"equal representation"* is a highly subjective term connoting a hoped-for result. This easy equating of the objective and the subjective is the central inadequacy of the majority's constitutional theory in the 1964 *Reapportionment Decisions.*

Dixon, at p. 269

And Dixon was not alone in pointing out lingering ambiguities in the *Reynolds* decision.

> The key word is "representation." Ostensibly it imports more than the mere right to cast a vote that will be weighed as heavily as the other votes cast in the election. But how much more? The 1964 reapportionment case did nothing to illuminate this problem.
>
> L. Tribe, "American Constitutional Law", second edition, p. 1074, Mineola, NY, The Foundation Press, 1988.

As long as equal population districts provided an easy solution, it was unnecessary to define the problem. Multi-

member districts were not recognized as adding any new substantive dimensions, but only an arithmetic variation. In upholding a county legislative plan for Rockland County, N.Y. in which each of five constituent towns was allocated a number of representatives linearly proportional to its population, this Court simply assumed without argument that such proportionality implements the *Reynolds* criteria. *Abate v. Mundt,* 403 U.S.182. The Court's decision as well as the dissent of Justices Brennan and Douglas dealt exclusively with justification of the plan's deviation from arithmetic perfection without even a hint of a distinction between equal-population districts and equal population-per-representative ratios. In a case decided at the same term, the Court was confronted with a mathematical argument claiming to show that such proportional allocation over-represents the larger districts if representation is measured by the power of a citizen to elect his representatives. *Whitcomb v. Chavis,* 403 U.S. 124. The Court accepted the mathematical argument but dismissed its conclusion. "The District Court did not quarrel with plaintiff's mathematics, nor do we. But like the District Court we note that the position remains a theoretical one. . . .and has not been sufficiently demonstrated, at least on this record, to warrant departure from prior cases." *Whitcomb,* 403 U.S. at 145-46. But what did the Court believe was being equalized in these prior cases? It could not have been representation at the citizen level or the value of a citizen's vote in the election of his representatives. Neither of these is equalized by *Abate*-style apportionment. Consider a plan including several towns, among them town A with 10,000 citizens and one representative, and town B with 20,000 citizens and two representatives. Following *Reynolds* and *Abate*, there would be perfect apportionment. But each citizen in town B has two representatives and the opportunity to muster two votes on his behalf, while each citizen in town A has but one. And what of the argument of plaintiffs in

Whitcomb that, if citizen vote power is to be equalized, representatives should be allocated proportional to the square-root of population? It is at least mathematically (if not psephologically) valid, as the Court itself acknowledged. On the other hand, no mathematical gyrations can show that a citizen's power to elect his representatives is equalized by the linear allocation favored by the Court. Furthermore, the factors cited by the Court as affecting "actual" voting power (party affiliation, race, previous voting characteristics) affect merely the probability of the occurrence of tie votes. Such factors are equally applicable in single-member, equal population districts, as gerrymander decisions acknowledge. In short, the proffered multi-member vote-power analysis is no more theoretical than that assumed in single-member plans.

If the population-per-representative rule does not equalize representation at the citizen level or equalize a citizen's vote power to elect his representatives, it nevertheless appears, intuitively, to achieve a "good" result. It is suggested that this is so because equal-population district plans and equal-population-per-representative multi-member district plans actually implement an equal opportunity for fair *district* representation by equalizing *district* voting power, and this is their only common attribute. The objective of district voting power apportionment is to give each district a voting power proportional to its population. This is automatically achieved in single-member plans and in multi-member plans when population-per-representative ratios are equalized. In a legislature consisting of 100 members, traditional representational analysis would allocate 5 members to a district with 5% of the population on the assumption that such allocation equalizes some citizen-oriented parameter. It does not. But it does allocate to such district 5% of the

legislature's voting power since each member holds a 1% share. It might be said that the right result has been achieved for the wrong reason. This fortuitous result does not obtain in all situations, especially not in the more unique governmental designs, like the Board of Estimate, that are encountered at the lowest, municipal levels of government.

District voting power can be equalized among districts of different populations by allocation of weighted votes rather than multiple representatives. This is a preferable alternative where the small size of a body, such as the 8-member Board of Estimate, is an essential factor contributing to the body's efficient and effective operation. But since weighted votes are always voted as a bloc, the allocation of votes follows a different arithmetic procedure than that used with multiple members. Nevertheless, the objectives are the same, viz., to give each district a voting power proportional to its population. The New York State Courts and the Second Circuit Court of Appeals have approved county government apportionment plans based upon an explicit equalization of district voting power. *Franklin v. Krause,* 32 N.Y.2d 234 (1973) *appeal dismissed,* 415 U.S. 940 (1974), *Iannucci v. Board of Supervisors,* 20 N.Y. 2d 244 (1967) *League of Women Voters v. Board of Supervisors of Nassau County,* 737 F.2d 155 (2d Cir. 1984), *Greenwald v. Board of Supervisors,* 567 F.Supp.200 (S.D.N.Y.), *aff'd without opinion,* 742 F. 2d 1434 (2d Cir. 1983). Of New York's 57 counties outside New York City, 24 have been so apportioned. Grofman & Scarrow, "Weighted Voting in New York," iv Legis L.Q.287,288 (May 1981).

Although apportionment decisions since *Reynolds* continue to be couched in terms of equalization of a citizen's vote value or weight, in fact fair representation has been the true, if unstated, basis for these decisions.

Chief Justice Warren acknowledged this obliquely in *Reynolds*. Justice Stewart was more direct.

> Representative government is a process of accommodating group interests through democratic institutional arrangements. Its function is to channel the numerous opinions, interests, and abilities of the people of a State into the making of the State's public policy. Appropriate legislative apportionment, therefore, should ideally be designed to insure effective representation in the State's legislature, in cooperation with other organs of political power, of the various groups and interests making up the electorate.

Reynolds v. Sims, 377 U.S. 533, 749 (STEWART, J., dissenting) Fair representation was reaffirmed by this Court as the fundamental aim of apportionment. *Gaffney v. Cummings,* 412 U.S. 735, 778 citing Chief Justice Warren in *Reynolds*. Recently, this Court once again made it clear that fair representation is the fundamental constitutional command.

> Thus, *Reynolds v. Sims* contemplated that "one person, one vote" would be only one among several neutral factors that serve the constitutional mandate of fair and effective representation. (Citation omitted). It was not itself to be the only goal of redistricting.

Davis v. Bandemer, __U.S.__106 S.Ct.2797, 2829 (POWELL, J. and STEVENS, J., concurring).

This circuitous recognition of fair representation as the essential constitutional guarantee can be (and could have been) reached directly. Logically, one should begin

by selecting an explicit apportionment goal and then proceed to define or evaluate implementation means.

> We must now cease to speak of equality in the singular and proceed to deal with equalities in the plural. . . .and the discourse on equality must bring us to reply to a precise question: what is the specific equality which has precedence in a democracy?
>
> G. Sartori, "Democratic Theory", p. 334, Wayne University Press, 1962.

Justice Frankfurter agreed that choices should precede implementation. "One cannot speak of "debasement" or "dilution" of the value of a vote until there is first defined a standard of reference as to what a vote should be worth". *Baker v. Carr,* 369 U.S. 186, 300 (1962) (FRANKFURTER, J., dissenting). Since ours is an electoral, representative democracy, the choice, in its simplest formulation, is between "electoral" and "representative" as the operative adjective. To equalize the "electoral" aspect of our democracy one has two choices: a direct voter referendum system without representatives, or a representative system in which all representatives are elected at large. Although seemingly democratic, such systems create a winner-take-all domination by the majority with no opportunity for protection of the interests of racial, ethnic, political or other minority group interests. In such circumstances nothing is equalized beyond the opportunity of each citizen to cast the same vote as every other citizen. The value or weight of a citizen's vote, if there be such a thing, is not equalized. This is so because elections are decided by groups of votes not by individual votes and, as a consequence, an individual's vote has no meaning except as it exists in combination with other votes. For example, in the borough of Brooklyn (Kings

County) enrolled Democrats outnumber all other political party enrollments combined by about six to one. In borough-wide elections, nomination by the Democratic Party is the equivalent of election. A Republican does not have the same weight or value of vote as a Democrat simply because each is entitled to cast a single ballot.

By concentrating on the representative aspect of our democracy and dividing a constitutency into districts, it becomes more feasible to achieve a more balanced protection of majority and minority group interests. A transition to represented sub-units brings with it a new set of problems regarding how unit boundaries and sizes are determined. But more importantly, it bifurcates a citizen's perspective as to which equality issue is paramount. Within a district, a citizen is most concerned with his ability to elect his preferred candidate as district representative. Within an entire governmental entity, a citizen is most concerned with the ability of his representative to compete with other district representatives.

Equality of a citizen's representation or vote value cannot be a fundamental parameter of constitutional interest in apportionment plans. There is, to begin with, no constitutionally mandated quantum of required citizen representation or vote value. In New York City, councilmanic districts comprise about 200,000 citizens, while in Albany about 6,400 citizens. Yet, no citizen of New York City could (or would) complain even though his vote is "debased" or "diluted" compared to that of a citizen of Albany. Likewise, if there were no Board of Estimate, no Brooklynite could complain that his vote is worth less than that of a Staten Islander in the election of his borough president, or in the alternative demand to have six borough presidents. A constitutional issue arises only when *representatives* compete in a common arena, i.e., sit on the same governmental body. Conversely, if in a single-member apportionment plan some members are arbitrarily allocated a greater vote weight, or if district lines are ger-

rymandered, even arithmetically perfect *Reynolds* or *Abate* apportionment will not save the plan.

Logic demands that the fundamental constitutional apportionment issue be one arising from the coming into being of a governmental body and one which if satisfied is immune from attack, i.e., be both a necessary and a sufficient condition. Fair district (borough) representation is the one parameter that fits this definition.

Of the various mathematical methods advanced to promote fair district representation for districts of unequal populations, only one has gained acceptance in the Courts, viz., district voting power. It is suggested that this method is the most appropriate for application to the Board of Estimate. The method was first developed employing the theory of games. Shapeley and Shubik, "A Method for Evaluating the Distribution of Power in a Committee System", 48 Am.Pol.Sci.Rev. 787 and first applied to the Board of Estimate in 1965, Krislov, "The Power Index, Reapportionment and the Principle of One Man, One Vote", 1965 M.U.L.L.37. Its most visible exponent in apportionment cases has been John Banzhaf III. Banzhaf, "Weighted Voting Doesn't Work: A Mathematical Analysis", 19 Rutgers L.R. 317, "Multimember Electoral Districts—Do They Violate the "One Man, One Vote" Principle", 75 Yale L.J. 1309. It is the method used to apportion 24 of New York State's county governments and the method Appellant Ponterio suggests is most appropriate for evaluating the apportionment of the Board of Estimate in this case. It is perhaps even more appropriate for the Board than for legislatures since the Board, unlike a legislature, functions only by voting. The Board has no committees. It enacts no laws. To the extent that its members provide constituent service, they do so not as Board members but in their underlying

roles as mayor, comptroller, council president and borough presidents.

This case presents this Court with an appropriate vehicle for clarifying unsettled apportionment issues and resolving lingering ambiguities. It is certainly a case of sufficient importance to warrant a comprehensive revue of the post-*Reynolds* evolvement of apportionment law and even a change of direction or emphasis. Since the Board is a specially tailored and limited-function body of local government, a decision of this Court departing from rigid adherence to ambiguous Equal Protection Clause principles and an acceptance of Due Process Clause principles of fair representation in the limited context of this case need not impact universally on the existing body of apportionment law.

POINT I

THE BOARD OF ESTIMATE PROVIDES A CONSTITUTIONALLY ACCEPTABLE INSTRUMENT OF LOCAL GOVERNMENT

On remand to the District Court after the first appeal in this action, the Second Circuit demonstrated the confusion that still surrounds apportionment law. On one hand it recognized the importance of fair borough representation. "Whether the present allocation of seats on the Board is a constitutionally permissible way of blending majority control with minority representation and other legitimate needs of local government is one issue to be examined on remand." (A204). But on the other hand, it dismissed Appellant Ponterio's argument that *Abate*-style apportionment of the Board would effectively disenfranchise Staten Island "the fact that a minority may regularly be overshadowed by its more populous neighbors under a proportional voting scheme is one characteristic of a representative democracy" (A204). The Second Circuit

thus continued to promote slavish adherence to apportionment by rote with a methodology that is blind to its consequences. Such a cavalier approach to the most fundamental of citizen rights cannot be allowed to stand.

The existence of fair brough representation on the Board as it now exists can easily be shown using the same district voting power methodology approved in *Frankin, League,* and *Greenwald.*[3,4] As already noted, district voting power is automatically equalized in all single-member, equal-population-district plans and in multi-member-district plans when members are apportioned by equalizing a population-per-member ratio among all districts. If there are a total of N members, each member holds a 1/N share of the total voting power. This equalizes district voting power since each member has the opportunity to vote independently of all other members (if a district has 5% of the total population and there are 100 members, that district will be allocated 5 members, i.e., 5% of the members, who in the aggregate have 5/100 or 5% of the total voting power).

3. The objective of district voting power apportionment is to give each constituent district (town, borough, etc.) a mathematical probability of affecting board vote outcomes proportional to its relative population. For example, if district A has 10% of the total population, its representative should have 10% of all decisive votes. "Decisive" means that if a town's vote is changed, the vote outcome of the board (e.g., achievement of a majority) is changed. By contrast, ordinary representational apportionment would allocate 10% of the number of representatives (or votes) to town A, without regard to the resulting ability of towns to affect vote outcomes.

4. This concept is commonly referred to as weighted voting since it is usually implemented using weighted votes rather than multiple members to preserve the effectiveness derived from the small size of such boards. Nevertheless, the operative feature of this concept is that it equalizes district voting power, not representation. Use of weighted votes is incidental.

If weighted votes are used instead of multiple members, equalization of district voting power is not as easily implemented. This is so because weighted votes are always voted as a bloc. For example, with 5 district members there are 2^5 or 32 possible vote combinations, but with a single member holding 5 votes, there are only 2 possible vote combinations (5 votes "yes" or 5 votes "no"). As a consequence, implementation of district voting power with weighted votes follows a trial-and-error procedure in which various combinations of vote weight allocations are tried until one is found which adequately apportions voting power in accordance with population. If it is required to synthesize a plan, it may be necessary to try many combinations; an arduous task that is substantially simplified by use of computers. No closed-form analytic solution has yet been developed for this task.

It should be emphasized that computers do no more than basic arithmetic and record-keeping. By contrast, analysis of an existing plan is much less arduous. Analysis requires nothing more complex than high-school algebra. No computers or computer experts are required. The computations involve only paper, pencil, and the knowledge of a reasonably bright high-school junior. The entire computation applicable to a simple majority vote of the full Board is given in Exhibit A of Appellant Ponterio's Jurisdictional Statement.[5]

The computations for every enabling vote combination of the full Board except the trivial unanimous vote combination (simple majority, 2/3 majority, 3/4 majority) and the mayorless Board (simple majority, 2/3 majority) were presented by Appellant Ponterio to the Courts below.

5. The formula appearing on page 23 of the Jurisdictional Statement contains a typographical error. The correct formula is $\frac{n!}{r!\,(n-r)!}$.

Appellant Ponterio agrees that the voting power apportionment on the Board could be made more mathematically perfect if all other factors were ignored. But all other factors should not be ignored. Apportionment is an art not a science. It involves people not just numbers. And much to the chagrin of mathematicians, people do not think or behave in accordance with tidy formulas. One plan cannot be said to be better than another solely because its deviation percentage is less. Furthermore, a substantial number of legitimate state interests have been shown by appellants in this case to warrant deviation from mathematically perfect apportionment (JA 381-98). The question of whether the Board configuration must be altered does not arise at all unless a determination is first made that the existing configuration is constitutionally unacceptable. There is no dispute that actual voting power on the Board is as shown in the "Vote Power" columns of Tables 1 and 2. There is no dispute that if Board voting power were apportioned with mathematical perfection according to borough populations, voting power would be as shown in the columns headed "Norm Vote Power." The malapportionment issue boils down to this: must a venerable, admittedly effective body of local government be completely revamped or discarded for the sole purpose of shifting 5 or 6% voting power from Staten Island to Brooklyn? We submit that the answer is no.

TABLE 1

VOTING POWER ANALYSIS
BOARD OF ESTIMATE (FULL BOARD)

		SIMPLE MAJORITY			2/3 MAJORITY			3/4 MAJORITY		
MEMBER	NO. OF VOTES	NORM VOTE POWER	VOTE POWER	% DEVIATION	NORM VOTE POWER	VOTE POWER	% DEVIATION	NORM VOTE POWER	VOTE POWER	% DEVIATION
BROOKLYN	1	13.72	8.70	-5.02	14.34	9.09	-5.25	14.80	9.38	-5.42
QUEENS	1	11.63	8.70	-2.93	12.16	9.09	-3.07	12.55	9.38	-3.17
MANHATTAN	1	8.78	8.70	-0.08	9.18	9.09	-0.09	9.47	9.38	-0.09
BRONX	1	7.19	8.70	+1.51	7.51	9.09	+1.58	7.75	9.38	+1.63
STATEN IS.	1	2.17	8.70	+6.53	2.26	9.09	+6.83	2.34	9.38	+7.04
MAYOR	2	18.84	18.84	0	18.18	18.18	0	17.70	17.70	0
COMPTROLLER	2	18.84	18.84	0	18.18	18.18	0	17.70	17.70	0
COUNCIL PRES.	2	18.84	18.84	0	18.18	18.18	0	17.70	17.70	0
MAXIMUM DEVIATION:				11.55%			12.08%			12.46%

TABLE 2

VOTING POWER ANALYSIS
BOARD OF ESTIMATE (MAYORLESS BOARD)

		SIMPLE MAJORITY			2/3 MAJORITY		
MEMBER	NO. OF VOTES	NORM VOTE POWER	VOTE POWER	% DEVIATION	NORM VOTE POWER	VOTE POWER	% DEVIATION
BROOKLYN	1	16.99	10.77	-6.22	16.90	10.71	-6.19
QUEENS	1	14.40	10.77	-3.63	14.32	10.71	-3.61
MANHATTAN	1	10.87	10.77	-0.10	10.81	10.71	-0.10
BRONX	1	8.90	10.77	+1.87	8.85	10.71	+1.86
STATEN IS.	1	2.68	10.77	+8.09	2.67	10.71	+8.04
COMPTROLLER	2	23.08	23.08	0	23.21	23.21	0
COUNCIL PRES.	2	23.08	23.08	0	23.21	23.21	0
MAXIMUM DEVIATION:				14.31%			14.23%

The overlay of at-large and local votes ensures that no enabling vote of the Board can occur without the vote of at least one or a combination of members representing the entire city. Clearly, there is majority control of the Board. On the full Board, the at-large members hold a majority of votes (6 out of 11) and a majority of voting power (56.52%). On the mayorless Board, the five borough presidents hold a majority of votes (5 out of 9) and voting power (53.85%). Nevertheless, majority control is still assured as it is still true that an enabling vote cannot occur without the vote of at least one or a combination of members representing the entire city. In the case where a 5-vote majority is achieved by the votes of the borough presidents alone, it has been argued that this gives Staten Island an undeserved veto power. What seems to have been overlooked is that even if the five borough votes were allocated on a strict population-per-vote basis (Brooklyn 1.58, Queens 1.34, Manhattan 1.01, Bronx 0.83, Staten Island 0.25) the result would be unchanged. Staten Island's 0.25 vote would be just as necessary in achieving the 5-vote total as its 1 vote under the current vote allocation. This illustration points up the danger of analyzing only one of many possibilities. It is the strength of the district voting power method that it accounts for all possibilities.[6] Analyses, properly done, show that the Board provides an acceptable blend of majority control and borough participation, i.e., fair representation.

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6. The Mayor does not participate in votes to override a mayoral budget veto. There are then 2' or 128 possible vote outcomes. Either the Board or the City Council may initiate a veto override. Override requires a ⅔ majority of the initiating body plus simple majority vote of the other body. Therefore, a 5-vote board majority is effective only when there has already been a ⅔ majority vote in the Council.

POINT II

THE DECISION OF THE COURT OF APPEALS TO ELIMINATE AT-LARGE MEMBERS FROM THE ANALYSIS WAS ARBITRARY AND WILL UNDERMINE THE IMPLEMENTATION OF INNOVATIVE FORMS OF LOCAL GOVERNMENT.

The Board of Estimate is the most powerful local governmental body of the most important city in the nation. Its composition and voting procedures are unique. Together with the City Council, it comprises the country's only bicameral municipal government. It is the paramount example of the kind of innovation the Supreme Court has recognized as essential.

> "[v]iable local governments may need many innovations, numerous combinations of old and new devices, [and] great flexibility in municipal arrangements to meet changing urban conditions," *Sailors v. Board of Education*, 387 U.S. 105, 110-11 (1967). "The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems." *Avery v. Midland County*, 390 U.S. 474, 485 (1968).

Innovative forms of government also need innovative scrutiny to assess their compliance with constitutional guarantees.The response of the courts below has been to strip the Board of all its salient features until a residue is left that can be analyzed by *Abate* methodology. If square pegs are repeatedly forced into round holes, sooner or later all pegs will be round.

The Court below cited two reasons for adopting the unmodified *Abate* method. First, it agreed with the District Court that the method has been used to analyze malapportionment in other cases involving a combination of at-large and local representatives. Second, it concluded,

on the basis of pure conjecture as to factual matters, that the Board is two tiered; one tier composed of 3 at-large members and a second tier composed of 5 local members, and that each tier must be analyzed separately.

In none of the cases relied upon by the courts below was analysis methodology in issue and in none of those cases would the conclusion have been materially affected by inclusion of at-large members in the analysis. A case-by-case analysis is presented in the Brief of Intervenor-Defendant-Appellant Ponterio on appeal to the Second Circuit Court of Appeals at pp. 13-16. Particularly noteworthy is the courts' reliance on *Avery*. Not only was there no issue raised therein as to choice of methodology, there was no analysis whatever. The sole issue was whether a unit of local government is subject to the one-person, one-vote principle in the first instance. The defendants in *Avery* made no claim that their apportionment plan met any constitutional test. In fact, they testified that population was not an apportionment criterion. Moreover, the courts below ignored altogether those cases in which at-large (floterial) members *were* included in apportionment analyses. *Davis v. Mann*, 377 U.S. 678 (1964); *Kilgarlin v. Hill*, 386 U.S. 120 (1967); *Mahan v. Howell*, 410 U.S. 315 (1972); *Kilgarlin v. Martin*, 252 F.Supp. 404 (S.D. Texas 1966); *Cosner v. Dalton*, 572 F.Supp. 350 (E.D. Va. 1981); *Boyer v. Gardner*, 540 F.Supp. 624 (D.N.H. 1982), and those Courts' own decisions, *Andrews v. Koch*, 528 F.Supp. 246 (E.D.N.Y. 1981) *summ. aff'd* 688 F.2d 815 (2d Cir. 1982), *aff'd sub nom. Giacobbe v. Andrews*, 459 U.S. 801 (1982).

There can be little doubt that the courts below hypothesized a two-tiered Board simply to avoid the slightly more complex task of assessing the Board as it undeniably exists—an inseparable 8-member body (A183

at n.16). Moreover, the Courts below totally ignored the only competent factual testimony with regard to Board operation, the affidavits of Mayor Koch and Borough President Lamberti, which explicitly refute the Court's hypothesized existence of a two-tiered Board and parochial attitudes of Board members (JA 506, 514). Mathematical uncertainty has been repeatedly used as the favorite excuse for not grappling with innovative apportionment plans. We were initially led to expect otherwise:

> "We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath of office requires no less of us." *Reynolds,* 377 U.S. at 566.

Nevertheless, this court backed away from that pledge 9 years later in its famous footnote, "We decline to enter this imbroglio of mathematical manipulation," *Mahan v. Howell,* 410 U.S. 315, 319, n. 6. In truth, the imbroglio in *Mahan* had nothing to do with mathematical manipulation. The note referred to a dispute as to whether floterial districts should be analyzed by the aggregate or shared-floater methods. The choice of method involves political science not mathematics. For example, the aggregate method might be appropriate where constituent districts have common interests or needs and the at-large (floater) representative represents his constituents as a unitary group without regard to their district of residence. The shared-floater method might be appropriate where constituent districts have diverse or conflicting interests, as where they have been combined for numerical convenience only. In such a case, an at-large representative may balance his representation in proportion to each district's population. Once a method is selected, there is no dispute whatever over the appropriate mathematical calculation. In short, the only factor *not* involved in the "imbroglio" is the "mathematical manipulation."

The Court's desire to restrict apportionment mathematics to sixth-grade arithmetic is no excuse for demolishing the Board of Estimate. District voting power is a court-approved basis for Board apportionment that accounts for every salient feature of the Board's composition and voting rules. It shows the Board to be constitutionally configured.

POINT III

THE DECISION OF THE COURT OF APPEALS CONTRADICTS PRIOR DECISIONS OF THE SUPREME COURT, THE COURT OF APPEALS, AND THE NEW YORK COURT OF APPEALS.

District voting power apportionment of county boards of supervisors in New York State is a fact of life and has been for over two decades. Use of this method has been approved explicitly by the State courts, *Franklin* and *Iannucci, supra,* and by the Second Circuit Court of Appeals, *League* and *Greenwald, supra.* By dismissing the appeal in *Franklin* for want of a substantial federal question, the Supreme Court has implicitly approved this apportionment basis.

Where district voting power is implemented with weighted votes, smaller districts must be given a greater vote weight than would be indicated by population-per-vote ratios. For example in the Nassau County case examined in *League*, the smallest town, Glen Cove, was allocated three times the number of votes indicated by a population-per-vote ratio.[7]

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7. Glen Cove had a population of 24,618 or 1.86% of the total county population of 1,321,582. By *Abate* standards, it should have been allocated 1.8% of the total of 108 board votes (i.e., 2 votes). Instead it was allocated 6 votes so that its voting power would be commensurate with its population.

Following plaintiffs' admission that district voting power apportionment is an acceptable method for applying constitutional one-person, one-vote principles to the Board of Estimate, appellant Ponterio presented appropriate computations to the District Court, and subsequently to the Court of Appeals, that account for the presence of the three at-large members as well as the five borough members. Neither court commented on these computations in its decision. Nor did either court reconcile its disapproval of Board apportionment with the Second Circuit's approval of the Nassau County Board in *League* whose malapportionment by *Abate* standards exceeds that of the Board of Estimate.[8] The city defendants presented no methodology argument in the District Court. On the second appeal they suggested a different voting power method, viz., citizen voting power (also termed the "Banzhaf index"). Citizen voting power purports to measure the power of a citizen to affect board vote outcomes, acting through his representative. It is calculated by multiplying his district's voting power by his power to elect board representatives. The first component is identical to district voting power described above. Appellant Ponterio does not favor this method because its second component relies upon many unrealistic assumptions and an essential ingredient has been rejected by the Supreme Court. *Whitcomb,* 403 U.S. at 145-46. A citizen's vote power is defined as the probability of his breaking a tie vote. A bit of simple arithmetic is enough to demonstrate the absence of realism in this method. Using the most favorable assumptions (a two-candidate contest, equal

8. The maximum deviation of the board approved in *League* is 5.26% if analyzed in terms of voting power but is 85.58% if analyzed by the *Abate* (population-per-vote ratio) method. Corresponding deviations for the Board of Estimate are 11.55% and 77.95%. (Brief of Intervenor-Defendant-Appellant Ponterio on appeal to the Second Circuit Court of Appeals at p. 18 and Ponterio's Reply Brief at p. 10.

probability of every outcome, 2.2 million registered voters) a tie vote can be expected to occur once in every 2.2 million elections or once every 8.8 million years! The method is also conceptually flawed. It credits a win to the last vote cast in much the same way as baseball statistics denote the 4th run in a 4-3 final score as *the* winning run. Obviously all 4 runs contribute equally to the win even though the last one may evoke a greater emotional response. Using the same analogy, the district voting power method treats each vote in a 6-5 split as decisive, i.e., each of the 6 votes is a winning vote. Finally, the citizen vote power method assumes that a representative votes the way the citizens who elected him want him to vote. Of course in a secret-ballot election, a candidate has no way of knowing who voted for him, and there is no basis for an assumption that a representative represents only those citizens of his own political party or any other probable constituency (indeed, following an election a winning candidate typically cannot find anyone who voted against him, or at least anyone who will admit it). Under any circumstances, given that the Board votes about 7000 times a year it is absurd to suggest that there is a single constituency that feels the same about all 7000 matters.

The Court of Appeals rejected the citizen voting power method. But it did so for the wrong reason, and in the process contradicted its own acceptance of the *district* voting power method in *League* and *Greenwald,* as well as the Supreme Court's acceptance of that method in *Franklin.* The Court finds "seriously defective" the method's assumptions of the "same weight . . . and same probability of occurrence for each of the 552 possible voting combinations in which a single Board member can

determine outcome" (A27).[9] This very premise underlies the district voting power analysis approved in *Franklin*, *League*, and *Greenwald*. *League*, 737 F. 2d at 168-69. Indeed it underlies every apportionment method.[10] It is not clear whether the Court understood that, in rejecting this component of the *citizen* voting power method, it was also rejecting the *district* voting power method altogether. The Court may have been misled by the city defendants' brief in which the two methods were confused and inaccurately described.

The Court of Appeals continues its contradiction of prior decisions by stating that "voter power over outcome is irrelevant to equal protection analysis" (A44) and that the equal protection clause protects "the equalization of voter representation, not interest representation" (A34). Obviously, both *Franklin* and *League* acknowledge the protection of interests (i.e., of towns, not of citizens) by equalizing the voting power that towns have over board

9. Among other things, the Court confuses voting combinations with decisive votes. Obviously, for an 8-member board, there are 2^8 or 256 possible voting combinations. In 168 of them (for a simple majority of 6 votes out of 11 votes) one or more members holds a decisive vote. The total number of decisive votes for all members in all these 168 combinations is 552.

10. Equal probability of voting combinations is at the heart of every apportionment scheme. It is assumed that by giving each citizen one vote his opportunity to elect a representative is the same as that of every other citizen. That assumption rests upon an equal probability premise and it matters not if actual election results support the premise (unless due to an invidious plan). By the same reasoning, equal allocation of legislators to equal groups of citizens is assumed to give each group equal vote power in the legislature. In practice such assumptions are never valid because of bloc or reciprocal voting at both the citizen level and the legislator level. This does not render invalid apportionment plans founded on such assumptions. The best any apportionment plan can hope to equalize is opportunity, not results.

vote outcomes. Furthermore, this Court has acknowledged the importance of group or interest representation in its gerry mander decisions. *Davis, supra, accord, Thornburg v. Gingles*, __U.S.__, 106 S. Ct. 2752 (1986).

POINT IV

THE COURT OF APPEALS ERRED IN AFFIRMING A DECISION ON A SUMMARY JUDGMENT MOTION WHEN CONTESTED ISSUES OF MATERIAL FACT WERE PRESENTED.

On remand after the first appeal of this action the District Court held a scheduling conference in which it was agreed that defendants, having the burden of proof, would submit briefs on methodology issues and plaintiffs would respond. Rather than respond to defendants' briefs, plaintiffs moved for summary judgment asserting the applicability of unmodified *Abate* analyses. Before responses to plaintiffs' motion were completed, a pre-trial status conference was ordered for February 1, 1984. At that conference, Judge Neaher stated that he was considering ordering a trial or hearing so that a complete record on methodology issues could be made. No trial or hearing was held. Instead, in August 1984 he issued a Memorandum and Order adopting the unmodified *Abate* method, without notice and without providing any opportunity for factual or other testimony. His choice of methodology was based on an observation that since there is a single tier of borough representatives on the Board, viz., the five Borough Presidents, *Abate*-method percent deviations should be calculated among those five members alone (A149). Judge Neaher decided that the Second Circuit was mistaken in believing that the Board's design raises novel apportionment issues (A136) and ruled out consideration of any method that takes into account the presence on the Board of the 3 at-large members (A179 at n. 8).

The Court of Appeals premised its selection of the unmodified *Abate* method on findings of fact that are not supported by a single word of testimony or other competent evidence in the record, i.e., that "citywide Board members and borough presidents represent different interests" (A30); that "borough presidents sit on the Board of Estimate as representatives of the special concerns their constituents have *qua* residents of a particular borough" (A32); and that "City-wide members. . . .must be supposed. . . .to represent. . . .the interests of their constituents *qua* residents of New York City" (A32). The only competent evidence in the record is precisely to the contrary. In the justification phase of these proceedings Mayor Edward I. Koch submitted an affidavit in which he specifically denies the existence of a two-tiered Board (JA 506). Borough President Ralph J. Lamberti submitted an affidavit in which he states; "Board members, regardless of the size of their constituencies, act upon local issues, as well as issues of citywide concern" (citing examples) (JA 514).

No citizens testified. Apart from the Koch and Lamberti affidavits, no board members testified. The Court below offers no clue as to how it was able to divine what is in the minds of board members and citizens. It doesn't state whether its determination applies to all citizens or some citizens, to all board members or some board members. This speculative determination is the crux of the Court's decision. Only by assuming the Board to be two-tiered is the Court able to support its selection of the unmodified *Abate* methodology and the resultant malapportionment percentage.

It is well settled that the function of a court of appeals as well as a trial court on a motion for summary judgment is merely to determine whether triable issues of material

fact exist, not to try such issues, *Empire Electronics Co. v. United States,* 311 F.2d 175, 179 (2d Cir. 1975), *Continental Casualty Co. v. City of Richmond,* 708 F. 2d 1483, 1487 (9th Cir. 1985); particularly where the facts are gleaned only from affidavits, *Jaroslawicz v. Seedman,* 528 F. 2d 727, 731 (2d Cir. 1975); and involve questions of intent or a subjective state of mind. *Washington Post Co. v. Keogh,* 365 F. 2d 965, 967, *aff'd* 125 U.S. App. D.C. 32, *cert. denied* 385 U.S. 1011, *International Longshoremen's Association, AFL-CIO v. Delta Steamship Lines, Inc.,* 832 F.2d 759 (2d Cir. 1987)., see *Friedman v. Meyers,* 482 F. 2d 435, 438-39 (2d Cir. 1973). Moreover, where the Court is confronted with a choice of inferences to be drawn from underlying facts in affidavits and exhibits, the inferences "must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962). The Court of Appeals erred in trying a factual issue raised *sua sponte* with "facts" the Court itself invented notwithstanding the presence in the record of affidavits contradicting the Court's inferred "facts."

CONCLUSION

Based upon principles of fair representation and the analyses presented by Appellant Ponterio, this Court should find that the Board of Estimate as it now exists is constitutionally apportioned. This Court should also find that the Court below erred in deciding a motion for summary judgment when contested issues of material fact were presented. Whether on substantive or procedural grounds, the decision of the Second Circuit Court of Appeals should be reversed.

June 10, 1988

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